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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 United States of America,) CR 04-951-PHX-DGC
10 Plaintiff,) **ORDER**
11 vs.)
12 Jaod Dodds,)
13 Defendant.)
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15 On March 15, 2006, the Court held a competency hearing pursuant to
16 18 U.S.C. § 4241(c). The purpose of the hearing was to determine whether Defendant is
17 competent to stand trial. The Court heard testimony from Dr. Susan Parrish, a psychologist
18 retained by Defendant. The Court also has considered reports from Dr. Parrish dated
19 September 24, 2004, and March 14, 2006; a Certificate of Restoration of Competency to
20 Stand Trial, dated May 29, 2005, signed by the Warden of the Federal Correctional Complex
21 at Butner, North Carolina; and a 56-page Forensic Evaluation by Drs. Robert Lucking and
22 Eugene Gourley at the Butner Facility. For the reasons set forth below, the Court concludes
23 that Defendant Dodds is not competent to stand trial.

24 **I. LEGAL STANDARD.**

25 In deciding whether Defendant is incompetent to stand trial, the Court must determine
26 whether “he is unable to understand the nature and consequences of the proceedings against
27 him or to assist properly in his defense[.]” 18 U.S.C. § 4241(d). In making this
28 determination, the Court must apply a preponderance of the evidence standard. *Id.* The

1 Ninth Circuit has held that “[t]he government has the burden of demonstrating by a
 2 preponderance of the evidence that the defendant is competent to stand trial.” *United States*
 3 *v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991).¹

4 **II. FACTUAL DETERMINATIONS.**

5 Dr. Parrish testified that she examined Mr. Dodds in 2002, 2004, and briefly before
 6 the Court’s hearing. Dr. Parrish administered a series of tests to Mr. Dodds in 2002 that
 7 revealed an IQ of approximately 62, substantially lower than the IQ of 114 that Mr. Dodds
 8 displayed at the age of 11. (Mr. Dodds is now 33 years old.) Dr. Parrish attributed the drop
 9 in IQ to a head injury Mr. Dodds suffered in a 2001 motorcycle accident.

10 In addition to the low IQ score, Dr. Parrish’s tests revealed sensory-perceptual
 11 functions comparable to those measured in a group of brain damaged individuals, motor
 12 functions worse than brain damaged individuals, and higher level brain functions in the
 13 moderately to severely impaired range. Dr. Parrish’s tests further revealed memory scores
 14 in the moderately impaired range, localization scores in the severely impaired range, and
 15 reading and arithmetic scores of a second-grade level. Dr. Parrish diagnosed Mr. Dodds as
 16 suffering dementia caused by his 2001 head injury. Dr. Parrish opined that Mr. Dodds is not
 17 competent to stand trial. She concluded that he is not competent to understand court
 18 proceedings or to assist defense counsel. In her 2004 report, Dr. Parrish concluded that it is
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21 ¹ There is a split of authority on whether the government or the defendant bears the
 22 burden of proof on this issue. The Ninth Circuit is one of a number of federal courts that
 23 have placed the burden on the government. *See United States v. Nichols*, 56 F.3d 403, 410
 24 (2nd Cir. 1995) (collecting cases). At least one circuit has held that the burden rests on the
 25 defendant. *See United States v. Robinson*, 404 F.3d 850, 856 (4th Cir. 2005). The Supreme
 26 Court has stated in *dictum* that “Congress has directed that the accused in a federal
 27 prosecution must prove incompetence by a preponderance of the evidence.” *Cooper v.*
 28 *Oklahoma*, 517 U.S. 360, 362 (1996). This statement, however, was made in passing,
 without analysis of § 4241(d), and in an opinion where the Supreme Court noted without
 objection that numerous states place the burden on the prosecution. *Id.* at 361-62. Because
 the Supreme Court’s statement is *dictum*, this Court feels bound to follow the Ninth Circuit
 rule.

1 highly unlikely that any attempt to restore Mr. Dodds to competency will succeed. The Court
2 finds Dr. Parrish's testimony to be credible.

3 The Court has read the detailed, 56-page report from Drs. Lucking and Gourley. The
4 report recounts observations and tests of Mr. Dodds over a four-month period. In addition
5 to testing and observing Mr. Dodds in the facility, Drs. Lucking and Gourley monitored his
6 telephone calls with family and friends and observed his interaction with inmates.

7 Mr. Dodds' performance on tests administered at the Butner Facility were consistently
8 poor. In fact, they are very consistent with test results obtained by Dr. Parrish. Drs. Lucking
9 and Gourley conclude, however, that Mr. Dodds is malingering. They base this conclusion
10 on his interaction with family and friends, which appears far more sophisticated than his
11 interaction with them; on written communication skills demonstrated before his arrest, as
12 contrasted to those demonstrated during his testing; and on previous conclusions by other
13 healthcare professionals that Mr. Dodds was feigning a mental disorder. Although Drs.
14 Lucking and Gourley recognize that the alleged malingering would interfere with the validity
15 of the tests they performed on Mr. Dodds and that the test results therefore are not reliable,
16 they conclude that the sophistication of his malingering efforts belies a competency to
17 understand his legal situation and to manipulate the system. They opine he is competent to
18 stand trial.

19 Dr. Parrish addressed the conclusions reached by Drs. Lucking and Gourley. She
20 noted that Mr. Dodds' test performance is consistent between their results and hers. She
21 opines in the March 14, 2006 letter that "[i]t is practically impossible to fake impairment at
22 the same level across 42 different scores." She also concludes that a quantitative analysis of
23 Mr. Dodds' performance across 42 indices of the Halstead-Reitan Neuropsychological Test
24 Battery demonstrates a greater similarity to the performance of genuinely head-injured
25 subjects than to the performance of malingering subjects. These consistencies, as well as Mr.
26 Dodds' performance on Dr. Parrish's fixed battery of tests, convinces her that Mr. Dodds is
27 genuinely mentally impaired.
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1 Dr. Parrish agreed that an interview with Mr. Dodds might lead one to conclude that
2 he is malingering. He speaks extremely slowly and in a child-like manner. She also noted,
3 however, that his seemingly more sophisticated level of communication with his mother and
4 others familiar to him might be attributable to familiarity and communication patterns
5 developed over time. She acknowledged that healthcare professionals in addition to Drs.
6 Lucking and Gourley have concluded that Mr. Dodds is malingering. She was of the
7 opinion, nonetheless, that Mr. Dodds' consistently poor performance on a wide range of tests
8 indicates true mental impairment. She also opined that Mr. Dodds' performance on her tests
9 reflect honest effort on his part.

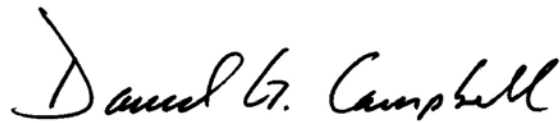
10 Thus, the Court is confronted with conflicting opinions from qualified medical
11 professionals. The Court finds the report of Drs. Lucking and Gourley to be thorough and
12 well-written. The Court also finds the testimony of Dr. Parrish to be credible. On balance,
13 the Court concludes that the preponderance of the evidence favors Dr. Parrish's opinion. The
14 Court is persuaded by Dr. Parrish's testimony that Mr. Dodds' consistently low scores on a
15 wide range of mental competency tests, administered by different doctors, reflects a genuine
16 mental impairment. The Court accepts her opinion that such a performance would be almost
17 impossible to fake. Therefore, although this is a close case, the Court concludes by a
18 preponderance of the evidence that Mr. Dodds "is unable to understand the nature and
19 consequences of the proceedings against him and to assist properly in his defense." 18
20 U.S.C. § 4241(d). The government has failed to satisfy its burden of proving Mr. Dodds'
21 competency to stand trial.

22 **III. CONCLUSION.**

23 Given the Court's finding that Mr. Dodds is not competent to stand trial, the normal
24 course under the statute would be for the Court to commit Mr. Dodds to the custody of the
25 Attorney General for hospitalization and treatment. 18 U.S.C. § 4241(d). Given that Mr.
26 Dodds has already been hospitalized and treated at the Butner Facility and that Dr. Parrish
27 has opined that Mr. Dodds will not recover from the mental deficits caused by his head
28 injury, the Court is not certain that such commitment is the right course in this case. It is

1 possible that this case must now be handled under the provisions of 18 U.S.C. § 4246. The
2 Court will schedule a hearing at which counsel are requested to address this issue. The
3 hearing shall be held on April 17, 2006, at 3:00 p.m.

4 DATED this 24th day of March, 2006.

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David G. Campbell
United States District Judge